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## Abolition of Graphical Representation in EU Trademark Directive: Should Countries with Similar Provisions Follow EU's Footsteps?

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Since the graphical representation requirement for trademark registration was abolished in the European Union, the need to critically appraise its effect on the registration of Non-Traditional Marks has become necessary. The question as to whether or not countries with similar provisions for graphical representation in their trademark laws should follow in the footsteps of the European Union has also become relevant. This paper critically evaluates the effect of the removal of the graphical representation requirement on the registration of olfactory, tactile and gustatory marks by offering arguments, examples and legal authorities to support its view. The paper found that even though the EU has recently relaxed the graphical representation requirement, this step makes very little practical difference to the registrability of olfactory, tactile and gustatory marks. The reason for the said category of mark's failure to satisfy the graphical representation requirement prior to its abolition still persists under the revised EU registration system. In this regard, the paper concludes that the changes brought about by the EU Trademark Reform Package are more cosmetic than substantive with regard to the registration of olfactory tactile and gustatory marks.

**Keywords:** European Union Trademark Directive, TRIPS, WTO, EU Trademark Registry, trademark registration, graphical representation requirement, non-traditional trademark, non-visually perceptible signs, representative registration, olfactory marks, gustatory marks, tactile marks

The graphical representation of signs is one of the basic requirements for the registration of a trademark.<sup>1</sup> The World Trade Organization Agreement on Trade Related Aspects of Intellectual Property (TRIPS) provides that WTO members may require that a sign be visually perceptible as a condition for registration.<sup>2</sup> It should be noted that there is a difference between graphical representation and visual perceptibility. While visual perceptibility suggests that a sign must be capable of being seen by the eye, graphical representation revolves around the depiction of a sign in a visible form e.g. in pictures, images or verbal description. The requirement of graphical representation is contained in the trademark laws of several countries.<sup>3</sup> While some countries have express provision for the requirement of graphical representation of signs prior to registration, others have provision that only imply that a sign sought to be registered must be visually perceptible before it can cross the hurdle of registration.<sup>4</sup>

The EU Trademark Law, prior to the amendment, expressly provided that signs must be 'capable of being represented graphically'.<sup>5</sup> In addition to the

requirement of graphical representation, a sign sort to be registered in the EU must be distinctive and must also be 'clear, precise, self-contained, easily accessible, intelligible, durable and objective'.<sup>6</sup> For the graphical representation requirement to be fulfilled, the representation of the sign must be adequate and the registrar must be satisfied with the manner in which it is depicted in the trademark register.<sup>1</sup> Instead of having to deposit the actual sample of the mark, a representation of the mark is expected to be filed. This is built around the notion of 'representative registration'.<sup>1</sup> The rationale behind the requirement has been categorized into three.

Firstly, graphical representation requirement is analogous to a patent claim in a patent application because it sets the scope and boundary for the protection of the sign sought to be protected.<sup>1</sup> Secondly, graphical representation requirement is informative in nature; it provides the possibility for the sign to become easily accessible by the public and rival traders. This is intended to afford third parties the opportunity of examining the sign in order to forestall possible infringement of rights conferred.<sup>1</sup> Thirdly, the requirement of graphical representation assists in the management of registered signs for administrative

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purposes particularly in the classification and comparison of existing signs with new ones.<sup>1</sup>

The need to ensure legal certainty in the process of registering a sign is the central theme of the three functions explained above.<sup>7</sup> It is trite that any law, which confers negative rights, must have its scope clearly defined to forestall subjective inferences.<sup>8</sup> However, the requirement made the registration of some non-traditional trademarks particularly non-visually perceptible signs difficult. The EU Directive, effective from 1 October 2017 removed the requirement graphical representation requirement with the aim of paving the way for the registration of more non- visually perceptible signs ‘using of available technology’.<sup>9</sup> This paper examines the effect of the removal of graphical representation requirement on the registration of olfactory, tactile and gustatory marks. The jurisprudence of the EU Court and the practice of the EU Trademark Registry prior to the abolition of the requirement is critically appraised. The extent to which the removal of graphical representation requirement affects the registration of the said category of marks is accessed. The paper concludes by suggesting to countries with similar provision for graphical representation requirement in their laws not to slavishly follow the footsteps of the European Union without taking into account the seemingly insignificant effect of the removal on the registration of such marks and the counter balancing mechanisms in the EU Trademarks Directive.

### Nature of Non-Traditional Marks

Trademarks are often categorized into two groups-traditional trademarks and non - traditional trademarks.<sup>10</sup> There is no legislation or case law that clearly defines the two categories. However, Non-Traditional Marks are the modern set of trademarks employed by business strategists to distinguish their products and services from that of others.<sup>8</sup> For a sign to be classified as being non-traditional, it must have been rarely thought of as a conventional sign capable of serving as a trademark.

Today’s commercial world has witnessed a steady growth in the use of Non-Traditional Marks. Non Traditional signs are a very broad category.<sup>8</sup> They are sometimes referred to as encompassing motion marks, three dimensional trademarks, colors, shapes, sounds, smells, tastes etc.<sup>11</sup> Several reasons have been ascribed to the growth in the use of Non-Traditional

Marks. Most businesses are in recent times faced with the multiplication of conventional signs already registered thereby reducing the number of available traditional signs (words, images and figures). Another reason for the growth in the use of Non-Traditional Marks can be traced to the resulting effect of the dilution doctrine and the expansion of the jurisprudence of trademark protection. Legislations and Courts in recent time have extended the scope of trademark protection beyond the traditional function of serving as a badge of origin by taking into account the infringing use of a trademark in a way that takes undue advantage of /or detrimental to the goodwill of a well-known mark.<sup>12</sup> The dilution style has discouraged business strategist from using Traditional marks for the fear of trademark infringement relating to the dilution style.<sup>13</sup> The attendant danger of trademark commodification through the dilution doctrine has caused traditional marks, such as, words, symbols or business logos to be subject of monopoly ownership thereby having a chilling effect on freedom of use by rival competitors. Furthermore, the main difficulty experienced in the registration of Non Traditional marks particularly smells, touch and taste marks, prior to the abolition of the graphical representation requirement ,was the hurdle of representing such marks in a ‘graphic’ or visually perceptible manner.<sup>7</sup>

### The EU Trademark System Prior to Abolition of Graphical Representation Requirement

This section will review the attitude of the Court and the EU Trademark Registry to the registration of olfactory and gustatory marks prior to the abolition of graphical representation requirement. In *John Lewis of Hungerford Ltd’s* trade mark application,<sup>14</sup> as per the Intellectual Property Office of the United Kingdom (UKIPO) Hearing Officer, the registration of a smell mark was described as “the smell, aroma, or essence of cinnamon” for being ambiguous and too precise. The Registrar was of the view that if the description of a mark will require that an examiner possess a previous experience, such description cannot be said to be sufficient. Upon appeal to Geoffrey Hobbs Q.C, a pictorial analysis generated by an “electronic nose” was held as unintelligible to a person examining the register. In *Ralf Sieckmann*,<sup>6</sup> the applicant sought to register the smell of a cinnamon, the mark was represented by way of a chemical formula and the applicant provided a verbal description of the mark with a sample. The Court held

that the representation of mark by way of chemical formula is not intelligible. The sample of the smell was also held not be durable or stable while the description of the smell was held not to be sufficient. Although the Court did not rule out the possibility of registering a smell mark, the criteria set for mark's fulfillment of graphical representation requirement seem to be hard and impossible. In *Sieckmann's* case, the possibility of visualizing a smell through a chromatography was considered, the court held that such technology was not precise enough to fulfill graphical representation requirement. It was in *Sieckmann's* case that the Court laid down the criteria a mark must fulfill prior to its registration. The Criteria are that such marks must be clear, precise, self-contained, easily accessible, intelligible, durable and objective'.<sup>15</sup>

There was an attempt by Eli Lilly to register the taste of artificial strawberry to mask the bitter taste of its drugs.<sup>15</sup> The OHIM rejected the application based on the fact that the mark lacks distinctiveness and the description of the mark lacks precision. *Eli Lilly* appealed to The Office for Harmonization in the Internal Market (*OHIM*) *Boards of Appeal*, but the appeal was rejected on the ground that the *Sieckmann's* criteria was not fulfilled.<sup>1</sup>

### The EU Trade Marks Reform Package

In 2008, the European Union saw the need to make necessary adjustments to the EU Trademark System.<sup>16</sup> This led to a request from the EU Council to the EU Commission to review its *modus operandi* and ensure that it complies with the changing realities in commercial trends. In response to this move, a study was conducted by Max-Planck Institute for Intellectual Property and Competition Law (MPI) between November 2009 and February 2011 on the reform of the European Trademark System.<sup>17</sup> One of the key recommendations of the report was the need to incorporate a more flexible approach into the registration of trademarks by removing the graphical representation criteria.<sup>18</sup> The graphical representation requirement was therefore abolished with the goal of opening up more opportunities for the registration of more Non- Traditional Marks through a simplified and less technical process of registration.<sup>18</sup> Effective from October 2017, the European Union Trade Marks Regulation (*EUTMR*) and the Trade Marks Directive (TMD) began to allow the registration of signs in any appropriate form using generally available technology

as long as the representation is clear, precise, easy accessible, intelligible, durable, self-contained and objective.<sup>18</sup>

### Analyzing the Amended Provision

#### The Provision Prior to the Amendment

Article 4 of the EUTMR prior to the Amendment provides:

*"An EU trade mark may consist of any signs capable of being represented graphically, particularly words, including personal names, designs, letters, numerals, the shape of goods or of their packaging, provided that such signs are capable of distinguishing the goods or services of one undertaking from those of other undertakings."*

#### The Amended Article 4 of EUTMR

*An EU trade mark may consist of any signs, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods or of the packaging of goods, or sounds, provided that such signs are capable of:*

- a) *Distinguishing the goods or services of one undertaking from those of other undertakings; and*
- b) *Being represented on the register of European Union Trademarks ('the Register), in a manner which enables the competent authorities and the public to determine the clear and precise subject matter afforded to its proprietor.*

A closer look at the two provisions indicate that the amended Article 4 is sub-divided into three parts. The first part gives a list of signs which EU trade mark may consist of. The question as to whether or not the list is an exhaustive list may not be necessary due to the use of the word 'may' as opposed to the word 'must'. The word 'may' suggests that there is an anticipation of more signs, particularly non-traditional marks even though they are not expressly listed. Also it has already been established in *Sieckmann's* case that non-visually perceptible signs are registrable in as much as such signs fulfills the requirement for graphical representation.<sup>6</sup>

It is important to note the new introduction of 'sound mark' in the amended Article 4 which is absent in the prior provision. The inclusion of a sound sign, which is the first type of non-visually perceivable trademark to be so listed in the EU

trademark legislation, suggests the attitude of the EU trademark law towards accepting more non-visual signs for trademark protection.

The second part of the amended provision is not different from what is contained in the prior provision. It provides that a sign must be distinctive and must be capable of indicating to a consumer, the origin of a good or service. The third part of the amended provision makes a substantial departure from the previous provision by removing the expression 'being represented graphically' and replacing same with 'being represented in the register'. This removal suggests that signs can be represented in any manner so long as it allows the consuming public and the competent authority understand the scope of protection accorded to the mark. To further achieve the goal of legal certainty, the seven criteria condensed in *Sieckmann's* case were codified.<sup>19</sup> It is provided that a sign should be permitted to be represented in any appropriate form using generally available technology as long as it is 'clear, precise, self-contained, easily accessible, intelligible, durable and objective'.<sup>20</sup>

### **Obstacles Stemming from Codification of *Sieckmann's* Criteria**

The most referenced case with regard to registration of Non-traditional Marks in the EU is *Sieckmann's* case.<sup>6</sup> In this case the court propounded the seven criteria that must be fulfilled for the representation of a sign to be accepted as a trademark. The criteria which are now commonly called the *Sieckmann's* criteria are that a sign sought to be registered must be 'clear, precise, self - contained, easily accessible, intelligible, durable and objective'. The seven criteria expressed by have now been codified in the EUTMR.

A critical look at the *Sieckmann's* criteria shows that it further exacerbates the already technical process in the registration of non-traditional marks thereby making the flexibility intended by the removal of graphical representation requirement of little effect.<sup>20</sup> Although the rationale behind the codification of *Sieckmann's* criteria is the need to ensure that marks sought to be registered are distinctive, some of the criteria particularly intelligibility portends a subjective inference.<sup>21</sup> To what extent can there be a generally acceptable standard of intelligence having regard to the disparity that exists in the level of education and cultural

background in the public space? It has been argued that the ECJ and the EUIPO confused graphical representation and the representation of mark when *Sieckmann's* case was being decided.<sup>21</sup> This presumption was arrived at on the ground that the court did not go further to elaborate on the criteria and how they are meant to be fulfilled and determined.<sup>22</sup>

Although the removal of the requirement of graphical representation requirement is intended to provide a more flexible and simple registration process for non-traditional marks, the ambiguity that the codification of the seven criteria in *Sieckmann's* case still pose to the registration process of non-traditional marks is capable of reducing the effect of graphical representation requirement removal.<sup>22</sup>

### **Practical Implications of the removal of Graphical Representation Requirement on Olfactory, Tactile and Gustatory Marks**

#### **Olfactory Marks**

Even with the removal of graphical representation requirement, the EUIPO guideline states that olfactory or smell marks are not registrable.<sup>23</sup> The reason for this is said to be the non-availability of the requisite technology needed to allow for a clear, precise, intelligible and self-contained representation of an olfactory mark.<sup>24</sup> Besides the non-availability of the requisite technology, a major challenge that rears its head against the registration of olfactory signs is the subjective nature of the mark.<sup>1</sup> The fact that an olfactory sign is not visually perceptible makes an objective perception of the mark difficult.<sup>21</sup> For instance, the sensory perception of how an orange smells is peculiar to individual who perceives the smell. Subjectivity therefore is an impediment to the registration of olfactory signs even with the removal of graphical representation requirement.<sup>25</sup>

The decision in *Sieckmann's* case further presents a seemingly hopeless situation for the registration of olfactory mark.<sup>6</sup> The fact that the Court pronounced that neither a chemical formula, a deposit of the smell, a verbal description nor a combination of all will be sufficient to represent an olfactory mark poses a great barrier to the likelihood of success for the registration of olfactory marks. The chemical formula was held to be insufficient because an average consumer will not be able to relate with the technical formula and as such fails the intelligibility test. The verbal description was held not to be subjective as it triggers different emotions from consumers. The deposit of the smell

sample was challenged based on its durability and the ambiguity that may arise from the manner in which the sample will be deposited and published for an examiner to access.

While there are agitations for the registration of olfactory marks particularly by the perfume industry, it is hoped that more the EU Court will reverse the findings of the Court in *Sieckmann's* and find a more flexible approach to the registration of olfactory marks.<sup>25</sup>

#### **Tactile and Gustatory Marks**

There seem not be so much hope in view for the registration of tactile and gustatory marks even with the removal of the graphical representation requirement.<sup>26</sup> Tactile marks allow consumers identify the source of a product by the perception of its touch while gustatory marks revolves around identifying a product by its taste. The EUIPO guideline categorically states that with the current available technology it remains impossible to depict a tactile mark and gustatory mark in a clear and precisemanner.<sup>27</sup> In practical terms, it may be difficult to pass the test of objectivity while registering tactile and gustatory marks due to their subjective nature. Tactile marks and gustatory marks are not visually perceptible; therefore, passing the objectivity test prescribed in *Sieckmann's* may be difficult. It is important to note that the OHIM Board of Appeal refused an application to register the taste of artificial strawberries by *Eli Lilly* a pharmaceutical company.<sup>27</sup> It was noted in that case that “*any manufacturer... is entitled to add the flavor of artificial strawberries to those products for the purpose of disguising any unpleasant taste that they might otherwise have or simply for the purpose of making them pleasant to taste... Moreover, the taste is unlikely to be perceived by consumers as a trademark; they are far more likely to assume that it is intended to disguise the unpleasant taste of the product...*” From this case it can be deduced that consumers are likely to not to use the texture or the taste of a product as an indicator of source but rather to use it as feature or component of the product. This suggests that the ability of tactile and gustatory marks to fulfill the essential function of a trademark which is to serve as a badge of origin is likely to be impossible. Therefore, even with the removal of graphical representation requirement, tactile and gustatory mark face other inherent obstacles to their registration.

#### **Technology and the Future Registration of Olfactory, Gustatory and Tactile Marks**

Now that a sign can be represented in any appropriate form using generally available technology, there is a lot of prospect for the registration of non-visually perceptible marks in the future. Technology holds a lot of promises in aiding the representation of marks in the registry and enhancing the ability of the competent authority and other examiners to ascertain the scope of protection conferred on the mark in the Trademark register.<sup>28</sup> Science in recent times has witnessed the development of high tech relating to sensory perceptions.<sup>29</sup> This is projected to assist in fixing the subjectivity issue affecting the registration of non-traditional signs particularly, olfactory, gustatory and tactile marks. Research has also shown that software capable of enhancing the ability of consumers to feel the texture of a product through an adaptable screen is being developed.<sup>30</sup> This connotes a strong prospect for the future registrability of tactile marks. With rate technological developments, the difficulties relating to the representation of non-traditional marks may thus be smaller than earlier thought.<sup>26</sup>

#### **Counter Mechanism Measures in the EU Trademark System**

Although graphical representation requirement has been abolished in the EU Trademark Law, there are some counter balancing mechanisms that continue to place restrains on the possibility of registering non-visually perceptible marks.

The EUTMR signs that consist exclusively of (i) the shape or another characteristic that excludes from registration results from the nature of the goods themselves; (ii) the shape or another characteristic of goods that is necessary to obtain a technical result; or (iii) the shape or another characteristic of the goods that gives substantial value to the goods.<sup>31</sup> This provision has the potential for placing restraints on the registration of non-traditional signs, particularly smells and colors. The expression ‘or another characteristics’ which is contained in the above stated Article 7 (1) (e) of the EU trademark Directive is a recent inclusion by a recent amendment.<sup>32</sup> Prior to the amendment, the provision of the Article 7(1) (e) only cover ‘shapes’ and not ‘another characteristics’. The introduction of the expression ‘another characteristics’ resulting from the nature of the goods, performing a technical function or giving substantial value to the goods will have a substantial effect on the

registration of some non-traditional marks particularly colors, tastes and smells. If an applicant intends to make an application for the registration of a smell mark, which constitutes a feature of the product, the registration could fall foul of Article 7(1) (e). Olfactory and gustatory marks for instance, are by their nature marks which normally form a substantial characteristic of the product for which a trademark protection is sought. An attempt to register the scent of cucumber for a wine product in order to mask its unpleasant smell could be refused under Article 7(1)e since the mark (scent of cucumber) is a feature of the product. It is important to note that the defect that arises from Article 7(1)(e) cannot be cured by *de facto* distinctiveness.<sup>33</sup> The fact that the sign sought to be registered has acquired secondary distinctiveness by reason of use in the market place will not cure the defect arising from Article 7(1) e.

### Should Countries with Similar Provisions Follow EU's example

Though the EU has recently removed the graphical representation requirement, the removal makes very little practical difference to the registrability of many non-traditional trademarks. Some of the marks which failed to fulfill the graphical representation requirement in the past continue to face several obstacles to their registration under the revised EU registration system. There seem to be some contradiction between the *Sieckmann's* criteria and the 10<sup>th</sup> recital of the EUTMR. The requirement of 'self-containment' for instance, suggests that the representation of a mark must not require the aid of other means to be perceptible. However the use of generally acceptable technology to aid the perception of marks is therefore contradictory to the criteria of self-containment. In this regard, the changes brought about by the EU Trademark Reform Package regarding the graphical representation requirement are more cosmetic than substantive. The obvious benefit is that the removal has liberalized the registration process and makes it more flexible. However, it might be helpful to consider the counter measures in Article 7(1)(e), the contradictions occasioned by the codification of *Sieckmann's* criteria and the infinitesimal effect of the removal of graphical representation requirement on olfactory, gustatory and tactile marks.

### Conclusion

The EU's recent relaxation of the graphical representation requirement, makes very little practical

difference to the registrability of Non-traditional trademarks. Marks which failed to satisfy the graphical representation requirement in the past continue to face obstacles to registration under the revised EU registration system. In this regard, the changes brought about by the EU Trademark Reform Package regarding the graphical representation requirement are more cosmetic than substantive. The codification of the *Sieckmann's* criteria remains unclear. Also, the provision of Article 7(1) (e) of the EUMIR serves as a counter measure to the prospect for registration of Olfactory, tactile and gustatory marks particularly those which exclusively consist of features that give substantial value to the product. It is therefore recommended that countries with similar provision should exercise caution in following in the footsteps of the EU due to the seemingly insignificant effect of the graphical representation removal.

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